

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Competitive Product Prices
Inbound Competitive Multi Service Agreements
With Foreign Postal Operators
Australian Postal Corporation—United States Postal Service
Bilateral Agreement (MC2011-34)
Negotiated Service Agreement

Docket No. CP2012-1

PUBLIC REPRESENTATIVE COMMENTS ON
POSTAL SERVICE NOTICE OF FILING AN ADDITIONAL
NEGOTIATED SERVICE AGREEMENT FOR INCLUSION WITHIN
INBOUND COMPETITIVE MULTI-SERVICE AGREEMENTS
WITH FOREIGN POSTAL OPERATORS 1

(October 31, 2011)

The Public Representative hereby provides comments pursuant to Order No. 919.¹ In that Order, the Commission established the above referenced docket to receive comments from interested persons, including the undersigned Public Representative, on the Postal Service's notice of its entry into an additional Inbound Competitive Multi-Service Agreement with a foreign postal operator.² The Notice concerns the inbound portion of a bilateral agreement with the Australian Postal Corporation (Australia Post) to be included within the Inbound Competitive Multi-Service Agreement with Foreign Postal Operators 1 product. Notice at 1.

The Australia Post Agreement establishes rates and classifications for the delivery of inbound Air Parcel Post (Air CP) and Express Mail Service (EMS). *Id.* at 4. The Agreement is intended to become effective January 1, 2012, and remain in effect for two years unless terminated sooner. *Id.*

¹ PRC Order No. 919, Notice and Order Concerning Filing of An Additional Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1, Negotiated Service Agreement, October 21, 2011.

² Notice of United States Postal Service of Filing Functionally Equivalent Inbound competitive Multi-Service Agreement with a Foreign Postal Operator, October 17, 2011 (herein "Notice").

Previously, in Order No. 546, the Commission approved the Inbound Competitive Multi-Service Agreement with Foreign Postal Operators 1 product, and the addition of an agreement with Koninklijke TNT Post BV and TNT Post Pakketservice Benelux BV (TNT Agreement), which serves as the baseline agreement for purposes of determining whether future agreements are functionally equivalent.³ Subsequently, the Commission determined that bilateral agreements with the China Post Group (China Post 2011 Agreement) and Norway Post (Norway Post Agreement) should be included within the Inbound Competitive Multi-Service Agreement with Foreign Postal Operators 1 product.⁴

In this proceeding, Chairman's Information Request (ChIR) No. 1 sought additional information concerning use of the negotiated rates from the Australia Post Agreement in the Postal Service's financial model and the applicability of any pay-for-performance requirements to inbound EMS and Air parcels from Australia.⁵ The Postal Service responded to ChIR No. 1 on October 28, 2011.⁶

COMMENTS

The Public Representative has reviewed the Australia Post Agreement and the supporting financial model filed under seal that accompanies the Postal Service's Notice. The Public Representative has also reviewed the responses and additional material filed in response to ChIR No. 1. Based upon that review, the Public Representative concludes that the Australia Post Agreement is not sufficiently similar, and therefore not functionally equivalent, to the baseline TNT Agreement. However, it appears the Australia Post Agreement should generate sufficient revenues to cover costs and satisfy the requirements of 39 U.S.C. § 3633.

³ PRC Order No. 546, Order Adding Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 to the Competitive Product List and Approving Included Agreement, Docket Nos. MC2010-34 and CP2010-95, September 29, 2010.

⁴ See PRC Order No. 859, Order Concerning An Additional Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 Negotiated Service Agreement, Docket No. CP2011-68, September 16, 2011; see *a/s/o* PRC Order No. 840, Order Concerning An Additional Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 Negotiated Service Agreement, Docket No. CP2011-69, September 27, 2011.

⁵ Chairman's Information Request No. 1 (ChIR No. 1), October 26, 2011.

⁶ United States Postal Service Response to Chairman's Information Request No. 1 and Notice of Filing Non-Public Materials (ChIR No. 1 Response), October 28, 2011.

Functional Equivalence. The Postal Service asserts that the “Australia Post Agreement is substantially similar to the inbound portion of the TNT Agreement based on the products being offered under the contract and the contract’s cost characteristics.” Notice at 5. The Postal Service also states that the Australia Post Agreement “fits within the parameters outlined by Governors’ Decision No. 10-3,” which established the rates and classification for Inbound Competitive Multi-Service Agreement with Foreign Postal Operators.⁷

The Postal Service identifies a number of differences between the Australia Post Agreement as compared to the TNT Agreement. Notice at 5-7. These include changes to the name and address of the foreign postal operator in the first paragraph, Article 15, Notices, signature block, and throughout the Agreement. Additional changes include a new Article 7, Customs Inspection, slight revisions to Article 22, Terms & Renewal, and details on the presorting and routing inbound parcels and EMS to specified U.S. points of entry in Annex 4, Office of Exchange Routing Details.

The Postal Service asserts that these differences do not “affect either the fundamental service the Postal Service is offering or the fundamental structure of the agreements.” *Id.* at 7. For the most part, the Public Representative agrees as these differences do not alter the conclusion that the Australia Post Agreement is functionally equivalent. In one important respect, however, the Australia Post Agreement is not similar to the TNT Agreement.

For EMS, Annex 1 of the Australia Post Agreement expressly incorporates the “service guarantees, targets and levels of achievement adopted by the members of the Kahala Post Group.” ChIR No. 1 Response, Question 2; Notice, Attachment 1 at 9. For inbound Air CP from Australia, no pay-for-performance arrangements will apply.⁸ By contrast, the TNT Agreement applies bilaterally negotiated performance thresholds and

⁷ *Id.*; see also Request of United States Postal Service to Add Inbound Competitive Multi-Service Agreements With Foreign Postal Operators to the Competitive Product List, and Notice of Filing (Under Seal) of Enabling Governors’ Decision and Negotiated Service Agreement, Docket Nos. MC2010-34 and CP2010-95, August 13, 2010, Attachment 2 (Governors’ Decision No. 10-3, Attachment B).

⁸ ChIR No. 1 Response, Question 3. The Postal Service should explain the absence of any pay-for-performance requirements applicable to inbound Air parcels.

penalties to both inbound EMS *and* Air parcels.⁹ The absence of any pay-for-performance requirements applicable to inbound Air CP constitutes a fundamental difference in the Australia Post Agreement compared to the baseline TNT Agreement. Consequently, the Public Representative concludes that the Australia Post Agreement is not functionally equivalent to the TNT Agreement.

Requirements of 39 U.S.C. § 3633. Pursuant to 39 U.S.C. § 3633(a), the Postal Service must demonstrate that the Australia Post Agreement covers its attributable costs, and thereby precludes the subsidization of competitive products by market dominant products. Unlike the initial financial model that accompanied the Postal Service's Notice, the revised financial model (under seal) included with the Postal Service's response to ChIR No. 1 incorporates the negotiated rates from Annex 1 of the Australia Post Agreement. ChIR No. 1, Question 1. The revised financial model indicates that the cost coverage based upon those negotiated rates is less than the cost coverage present in the initial financial model. Nevertheless, the revised financial model shows that the Australia Post Agreement should generate sufficient revenues to cover costs and thereby satisfy the requirements of section 3633(a).

That said, the Public Representative considers the estimated cost coverage to be minimally compliant with section 3633(a). The estimate cost coverage depends heavily upon the reliability of the volume and cost estimates. A relatively small estimation error could result in higher costs or lower revenues, causing the Agreement to not cover its costs. The Commission has previously expressed concern about the Postal Service's cost and revenue estimates with respect to negotiated rates for EMS service.¹⁰ These concerns are also applicable to the Australia Post Agreement and suggest that the Agreement may not cover costs.

It should be noted that while the Australia Post Agreement specifically makes the pay-for-performance requirements of the Kahala Post Group applicable to inbound EMS

⁹ Response of the United States Postal Service to Chairman's Information Request No. 2, Docket Nos. MC2010-34, CP2010-95, September 23, 2010; Request of United States Postal Service to Add Inbound Competitive Multi-Service Agreements with Foreign Postal Operators to the Competitive Product List, and Notice of Filing (Under Seal) of Enabling Governors' Decision and Negotiated Service Agreement, August 13, 2010, Attachment 3, at 8.

¹⁰ 2010 Annual Compliance Determination, Docket No. ACR2010, March 29, 2011, at 146.

from Australia, the revised financial model does not provide any information concerning the expected performance of EMS with respect to late delivery, late information return and missing delivery information.¹¹ The Commission should seek further explanation from the Postal Service concerning the expected performance of EMS, and the effect (if any) of that performance on the estimated revenue and cost coverage of the Agreement.

The Public Representative respectfully submits the foregoing comments for the Commission's consideration.

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¹¹ Excel file (Non-Public) AUS_Comp_IB_2011.10.27.xls, worksheet tabs 09_PFP_Penalties_Per 1 and 10_PFP_Penalties_Per 2.